Supreme Court, U.S.
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No. 85-474

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PATRICK M. HYATT, HERMAN O. CAUDLE AND MARY P. LOVINGOOD, on behalf of themselves and all others similarly situated,

Petitioners,

v.

MARGARET M. HECKLER, or her successors in office, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent,

and

NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DISABILITY DETERMINATION SERVICES,

Intervenor-Nominal Respondent.

REPLY BRIEF OF PETITIONERS

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NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DISABILITY DETERMINATION SERVICES,

Intervenor-Nominal Respondent.

DISCUSSION

A Petition for Certiorari was filed in this case because the Court of Appeals erred in two separate ways. First, the Court of Appeals excluded from class membership all initial applicants for benefits who had not fully exhausted administrative remedies and formally satisfied the 60-day time requirement set forth in 42 U.S.C. § 405(g). Second, the Court of Appeals vacated the District Court's injunction ordering the Secretary to stop nonacquiescing in Fourth Circuit law and to follow in particular that Court's holding in *Martin v. Secretary of HEW*, 492 F.2d 905 (4th Cir. 1974). In their Petition for Certiorari, petitioners independently challenged each of these actions.

The Secretary of Health and Human Services has now filed her Brief for the Respondents in response to the Petition. That Brief

lumps together in a confusing manner analysis of the petitioners' two distinct challenges to the Court of Appeals' decision.[1] In addition, the Response seeks to suggest that the issues in this case are procedurally encumbered and fact-specific. That is not the case. In fact, this case presents pure and concrete questions of law of extraordinary continuing importance both in and beyond the context of this case. These issues merit the prompt attention of the Court.

A. *The Class-Scope Issues.*

As the Secretary recognizes, the exhaustion, 60-days, and mandamus issues in this case resemble issues already before the Court in *Heckler v. City of New York*, cert. granted, No. 84-1923 (Oct. 7, 1985), and *Heckler v. Owens*, prob. juris. noted, No. 84-1905 (Oct. 15, 1985). Accordingly, as the Secretary acknowledges, this Petition should at a minimum be held pending resolution of those cases. Brief for the Respondents 8, 14 (Point 2). As pointed out in the Petition, however, the nonacquiescence feature of this case makes the class-scope arguments here far stronger than those in *City of New York* or *Owens*. *See* Petition for Certiorari 23-24, 25-26. Accordingly, a grant of certiorari on the class-scope issue remains appropriate notwithstanding the pendency of those cases.[2] Even more significantly, however, the pendency of *City of New York* and *Owens* does not in any way justify a "hold" of the separate injunction issue presented by this Petition.

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[1]It also advances a number of arguments that are simply beside the point. *See* Brief For the Respondents 11 n.1 (addressing pain-injunction issue which is no longer in the case); *id* at 11-12 (Point 3c, restating exhaustion arguments being made in *City of New York* and *Owens* cases despite acknowledgement that this case should be held pending their resolution); *id* at 7 (Point 1; invoking *Heckler v. Kuehner*, No. 83-1593, and *Heckler v. Lopez*, No. 84-115, although brief orders in those pure medical improvement cases did not in any way dispose of the class-scope and injunction issues presented by the Petition here).

[2]It is not uncommon for the Court to grant certiorari in related cases and then to schedule argument in those cases for the same day. *See* R. Stern & E. Gressman, *Supreme Court Practice*, § 14.10, at 752 (5th ed. 1978); *see also* S. Ct. Rule 37.3. Neither *City of New York* nor *Owens* has yet been set for oral argument, and petitioners are prepared to comply with any expedited briefing schedule necessary to hear all these cases in the same argument session.

B. *The Injunction Issue.*

The Fourth Circuit held in this case that *Heckler v. Day*, ____ U.S. ____, 104 S. Ct. 2249 (1984), and the legistative history of the 1984 Act preclude the issuance of injunctions to remedy the Secretary's policy of nonacquiescence. App. 49-50. As explained in the Petition for Certiorari, the Fourth Circuit erred severely in adopting this expansive reading of *Day*. *See* Petition for Certiorari 9-15; *accord*, *Steiberger v. Heckler*, 615 F. Supp. 1315, 1375-76 (S.D.N.Y.), appeal pending, No. 85-6310 (2d Cir. 1985). Indeed, the most telling aspect of the Secretary's responsive brief is that it makes *no effort whatsoever* to defend the Fourth Circuit's holding on the injunction issue.

Instead, the Secretary seeks to marshall peripheral arguments why this Court should not intervene to correct the Fourth Circuit's error. She first argues, without citation to any authority, that the case is "moot" because certain named plaintiffs have secured the relief they sought. Brief for the Respondents 8-10 (Point 3a). In particular, the Secretary argues that Herman Caudle's hypertension claim was mooted on May 3, 1984, when his estate received a favorable disability determination. *Id.* at 10. By that date, however, the District Court had already certified the class and the Secretary had appealed. *See* A-101; Notice of Appeal (attached as Exhibit A). It clearly follows that the Secretary's class-representative mootness argument is without merit. *E.g.*, *Franks v. Bowman Transport Co.*, 424 U.S. 747, 755-57 (1976); *Sosna v. Iowa*, 419 U.S. 393 (1975); *see generally* Newberg on Class Actions § 2.29 (2d ed. 1985) ("The Supreme Court has broadly declared that when claims of a class representative in a certified class action become moot on appeal because of intervening events or changing conditions, the appeal will not be dismissed as moot . . . ").[3]

[3]There are at least two other reasons why the Secretary's mootness argument should be rejected. First, the Secretary herself has separately appealed the District Court's attorneys fee award to plaintiffs during the pendency of this proceeding in this Court. Thus, the Secretary's own actions have kept the named plaintiffs involved and interested in this case, particularly because a victory in this Court would remove any conceivable doubt about the Secretary's argument in opposition to the fee award that the plaintiffs are not "prevailing parties." *See Deposit Guaranty National Bank*

The Secretary next argues that review by this Court is inappropriate because the Fourth Circuit did not consider whether the Secretary's policies conflicted with *Martin*. Brief for the Respondents 11 (Point 3c). The premise of the Secretary's argument is doubtful. *See* Petition for Certiorari at 7 n.7. Even more importantly, however, this contention is beside the point because the Fourth Circuit did explicitly hold that injunctive relief is never available in nonacquiescence cases, and that question is squarely presented here. After resolving the question presented by this Petition, this Court may, if it deems it appropriate, return the case to the Fourth Circuit to examine the District Court's finding that the Secretary's policy violated *Martin*. Indeed, that is the practice routinely followed by this Court. *E.g., Davis v. Passman*, 442 U.S. 228, 248-49 (1979) (reversing Court of Appeals holding that damage remedy unavailable for Fifth Amendment violation, but remanding for further consideration of issue, not previously addressed by lower court, whether particular claim is legally cognizable). Moreover, this practice is a wise one because otherwise important issues, like the injunction issue presented here, would escape Supreme Court review merely because an alternative argument in support of a judgment was not considered by the lower court.

Finally, the Secretary relies on "changed circumstances" in seeking to avoid this Court's review of the Fourth Circuit's broad prohibition on injunctions. Brief of Respondents 12-14. Again, any inquiry into the continuing appropriateness of the particular injunction at issue here (or of any portion of it, such as the portion specifically dealing with *Martin*) would be appropriate only on remand once this

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v. Roper, 445 U.S. 326, 335-36 & n.6 (1980) (rejecting mootness argument based on named plaintiffs' continuing interest in sharing litigation expenses). Second, the Secretary's mootness argument must be rejected because it was her *own action* in awarding benefits to these named plaintiffs that purportedly mooted this class action. *See id.* at 339 ("to deny the right of appeal simply because the defendant has sought to buy off the individual private claims of the named plaintiffs would be contrary to sound judicial administration"). Notably, the Secretary also fails to mention that Ms. Lovingood's claim, like Mr. Caudle's, was a live one after the class certification and appeal because the disability determination concerning her remained subject to Appeals Council review and reversal through April 28, 1984, 20 C.F.R. § 404.969.

Court has reviewed the Fourth Circuit's far-reaching and purely legal determination that *no* injunctions are *ever* permissible in nonacquiescence cases.[4]

In any event, the "changed circumstances" cited by the Secretary cannot change the fact that these class members, including the many class members who fully exhausted administrative remedies, were subjected to the Secretary's policy of nonacquiescence. During the pendency of this case, the Secretary has reaffirmed her continuing intention to nonacquiesce to a substantial degree in decisions of the United States Courts of Appeals. *See* Petition for Certiorari at 16; Brief for the Respondents 13. There is no reason why all proper class members should not have the benefit of the District Court's wholly proper injunction to ensure that they are not subjected to the Secretary's nonacquiescence policy once again. *See Steiberger v. Heckler*, 615 F. Supp. 1315, 1367-74 (S.D.N.Y. 1985) (enjoining Secretary's nonacquiescence policy despite promulgation of Interim Circular 185).

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[4]In addition, the Secretary's "changed circumstances" argument is, when properly characterized, nothing more than a claim of mootness based on her own purported or contemplated modifications of policy on nonacquiescence in general and the treatment of hypertention and diabetes in particular. *See* Brief for the Respondents 13-14 (citing changed circumstances as showing that "there is no ripe controversy"). Yet it is well established that "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *accord, e.g., United States v. Concentrated Phosphate Export Assocs.*, 393 U.S. 199, 203 (1968); *see also Vitek v. Jones*, 445 U.S. 480, 486 (1980). It bears emphasis in this regard that section 4 of the 1984 Act (attached hereto as Exhibit B) lends no weight at all to the Secretary's "changed circumstances" contention. Brief of the Respondents 13 (Point 3d, Second). In fact, that provision -- which affirmatively instructs the Secretary to consider the combined effect of multiple impairments -- has *absolutely nothing* to do with this case or with *Martin* -- which invalidated the Secretary's conclusive presumption that hypertension or diabetes can never be disabling without end-organ damage. The Secretary implies that section 4 somehow expands her authority to define certain medical conditions as *ipso facto* non-disabling, but courts construing section 4 have consistently rejected this view. *E.g., Johnson v. Heckler*, 769 F.2d 1202, 1212, (7th Cir. 1985); *Yuckert v. Heckler*, 774 F.2d 1365, 1370, (9th Cir. 1985). In any event, *Martin* in no way "critici[zed] this approach," Brief of the Respondents 13; rather it struck down as unsupported and unjustified only the particular conclusive presumption concerning hypertension and diabetes at issue in that case, 492 F.2d at 910.

Contrary to the Secretary's suggestions, recent developments *confirm* the need for Supreme Court review of this case. Nonacquiescence cases continue to be initiated and litigated throughout the nation.[5] Moreoever, on December 5, 1985, the Secretary announced that she would begin again a nationwide review of tens of thousands of disability files — precisely the same wholesale reevaluation process that first led to this and similar litigation. Pear, *U.S. Will Resume Reviews of Rolls for Disability Aid*, N.Y. Times, Dec. 6, 1985, p. 1, col. 6. These factors underscore the need to correct the Fourth Circuit's holding that the Secretary may continue to flout controlling circuit court authority free from the threat of injunctive relief.

CONCLUSION

This case involves thousands of persons seriously harmed by the Secretary's policy of nonacquiescence. These claimants were deprived of a needed and wholly lawful remedy because the Court of Appeals committed clear error. The Secretary's effort to shift attention away from the real issues in this important case is wrong and should be rejected. Petitioners accordingly submit that their Petition for Certiorari be granted.

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[5]Many of the cases are mentioned in *Steiberger*. *See also* A. Fried, *A Disability Appeal Primer*, West's Soc. Sec. Rep. Serv. Vol. 9, No. 2, at p. 245, 247 n.10 (July 1985) (collecting "[e]xamples of the many cases involving nonacquiescence"). Recently commenced and unreported cases include *Adamson v. Heckler*, Civ. A. No. 84-C-2024 (D. Colo.), appeal pending, No. 85-2396 (10th Cir. 1985) (treating physician issue); *Wilkerson v. Heckler*, Civ. A. No. 84-2548 (E.D.Pa.) (alcoholism issue); *see also Aldrich v. Heckler*, 1985 CCH Unemp. Ins. Rep. ¶16,369 (June 25, 1985) (treating physician and pain issues).

Respectfully submitted,

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Dated: December 16, 1985

EXHIBIT A

[Filed April 5, 1984]

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

PATRICK H. HYATT, HERMAN O. CAUDLE,
and MARY P. LOVINGOOD,
Plaintiffs,

vs.

MARGARET HECKLER, or her Successors in Office,
Secertary of the United States Department of Health
and Human Services,
Defendant

CIVIL NO. C-C-83-0655-M

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the above-named Defendant hereby appeals to the United States Court of Appeals for the Fourth Circuit from the decision of this court entered in the above-captioned proceeding on the 27th day of March, 1984, and all previous adverse judgments.

This the 5th day of April, 1984.

Charles R. Brewer
United States Attorney

/s/ RICHARD S. POE
RICHARD S. POE
Assistant U.S. Attorney

EXHIBIT B

MULTIPLE IMPAIRMENTS

SEC. 4. (a)(1) Section 223(d)(2) of the Social Security Act is amended by adding at the end thereof the following new subparagraph:

"(C) In determining whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section, the Secretary shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity. If the Secretary does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process."

(2) The third sentence of section 216(i)(1) of such Act is amended by inserting "(2)(C)," after "(2)(A),".

(b) Section 1614(a)(3) of such Act is amended by adding at the end thereof the following new subparagraph:

"(G) In determining whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section, the Secretary shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity. If the Secretary does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process.".

(c) The amendments made by this section shall apply with respect to determinations made on or after the first day of the first month beginning after 30 days after the date of the enactment of this Act.